

**Niagara Machine & Tool Works and Steven R. Raczka and David P. Raczowski and John C. Hoefler and Richard J. Lawicki and Vincent A. Moncreiffe**

**Local 508, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Steven R. Raczka and David P. Raczowski and John C. Hoefler and Richard J. Lawicki and Vincent A. Moncreiffe.** Cases 3-CA-10961, 3-CA-11007, 3-CA-11021, 3-CA-11168, 3-CA-11178, 3-CB-4025, 3-CB-4041, 3-CB-4045, 3-CB-4095, and 3-CB-4099

26 August 1983

## DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
JENKINS AND ZIMMERMAN

This case<sup>1</sup> raises the issues of whether Respondents violated the Act by applying a superseniority contract clause to grant superseniority to three members of Respondent Union's executive board which resulted in the layoffs of other more senior employees, and whether Respondent Company unlawfully threatened to apply that clause to grant superseniority to a fourth member of Respondent Union's executive board.

The Administrative Law Judge found that the contractual provision granting superseniority to members of Respondent Union's executive board for layoff purposes was lawfully applied.<sup>2</sup> He, therefore, dismissed all allegations. In doing so, he relied upon *Limpco Mfg.*,<sup>3</sup> which permitted superseniority for layoff and recall purposes to union officers whose responsibilities bear a direct relationship to the effective and efficient representation of union employees.

In the meantime, the Board was reconsidering its treatment of superseniority granted to nonsteward union officers. In the resulting *Gulton Electro-Voice*, 266 NLRB 406 (Mar. 7, 1983), it overruled the test for lawfulness approved in *Limpco Mfg.*, and its

progeny.<sup>4</sup> The Board found that the inherent discrimination of a superseniority provision is only justified by the compelling need for a steward or other union agent to perform on-the-job grievance processing or contract administration. It, accordingly, overruled the *Limpco Mfg.*, test and found that the effective and efficient representation of unit employees does not sanction, or even require, the grant of superseniority to union officers who do not perform these in-plant duties. It, further, concluded that only those superseniority provisions are lawful which are limited to employees who, as agents of a union, must be on the job to accomplish their grievance processing duties or other duties directly related to administering the collective-bargaining agreement. We have examined the record under the now existing standard for superseniority and have concluded, as explained below, that Respondents have violated the Act by their application of the superseniority provision, and that Respondent Company also violated the Act by threatening to apply that provision in an unlawful manner.

The pertinent facts, as more fully set forth by the Administrative Law Judge, are basically not disputed. The parties stipulated that Respondents had a collective-bargaining agreement, effective 1 May 1980 to 30 April 1983, that contained seniority preference as to layoff for five members of Respondent Union's executive board and all members of the shop committee, and as to layoff and recall for stewards.<sup>5</sup> The parties also stipulated that the superseniority provision was implemented to grant superseniority to three of the members of the executive board, causing the layoff of six other employees out of order of seniority based on length of employment.<sup>6</sup>

<sup>4</sup> See, in particular, *American Can Co.*, 244 NLRB 736 (1979), enf'd. 658 F.2d 746 (10th Cir. 1981).

<sup>5</sup> The collective-bargaining agreement, in pertinent part, provides:

Notwithstanding his position on the seniority list, each member of the shop committee and not more than five (5) members of the executive board shall, at the point where they would be subject to layoff from the plant, be continued at work as long as there is a job in the plant that they are able to do. Each steward shall, in the event of a layoff, be continued at work as long as there is a job in his respective zone which he is able to do and while any of his respective constituents are still at work and shall be recalled to work after the layoff as soon as there is a job in his respective zone which he is able to do and as soon as any of his respective constituents have been recalled to work.

(The parties stipulated that this provision had been in their collective-bargaining agreements since 1947.)

<sup>6</sup> The pertinent stipulations are:

(a) On 13 November 1981 and 6 August 1982 Respondents invoked the above superseniority clause to lay off Michael Szczepanowski and Richard Lawicki, respectively, in order to retain Joseph Duncan, the Union's guide and executive board member, who has less seniority than the laid-off employees.

*Continued*

<sup>1</sup> On 28 February 1982 Administrative Law Judge Hubert E. Lott issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent Union filed cross-exceptions. Respondent Union and Respondent Company also filed answering briefs to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent with our Decision herein.

<sup>2</sup> Although the complaint alleges that the maintenance of the provision is also unlawful, counsel for the General Counsel disclaimed this allegation at the hearing. The allegation has not been subsequently raised. We, accordingly, restrict our consideration to the lawfulness of the application of the superseniority provision.

<sup>3</sup> *Machine Workers Local 623 (Limpco Mfg.)*, 230 NLRB 406 (1977), enf'd. sub nom. *D'Amico v. NLRB*, 582 F.2d 820 (3d Cir. 1978).

The parties further stipulated that Frederick Giese, a supervisor and agent of Respondent Company, told employee Kenneth Jusiak that he would be laid off in order to retain Robert Hayes, a union trustee and a member of Respondent Union's executive board.<sup>7</sup>

All members of the executive board are officers of Respondent Union. Thus, in considering the issues set forth above, we have, as did the parties in litigating this matter, and the Administrative Law Judge in reaching his findings and conclusions, considered both the duties specific to the particular office and those attaching to the status of an executive board member.

Recording secretary Cherry Germann testified that the only duty of that office requiring her presence at the plant was her maintenance of a union bulletin board.<sup>8</sup> She also testified that she performed the bulk of her duties<sup>9</sup> away from the plant and most of these in her home, and that she continued to act as recording secretary despite her absence from work since 10 September 1982 because of disability.<sup>10</sup>

Clay Wilson, Respondent Union's sergeant-at-arms,<sup>11</sup> similarly testified that his office did not require any in-plant duties or the handling or processing of grievances. He also performed his official duties at the October 1982 union meeting although laid off at that time.

(b) Respondents invoked the above superseniority clause to lay off Steven Raczkowski and David Raczkowski on 13 November 1981, David Raczkowski on 9 April 1982, and Vincent Moncreiffe on 6 August 1982, in order to retain Cherry Germann, recording secretary and executive board member, who has less seniority than the laid-off employees.

(c) Respondents invoked the above superseniority clause in order to lay off John Hoefer on 30 April 1982, and retain Clay Wilson, the Union's sergeant-at-arms and executive board member who has less seniority than Hoefer.

<sup>7</sup> There is no allegation that the threat was effectuated.

<sup>8</sup> Respondent Union's constitution and the local bylaws require the recording secretary to perform the following functions: (a) keep records of proceedings of the local union, (b) sign all orders on the treasury authorized by the local union, (c) read all documents and conduct the general correspondence, (d) bring to the attention of membership all correspondence which needs action by the membership, (e) furnish to the research department of the Union and to the Regional Director, every 6 months, three copies of the existing contracts, (f) complete revised lists of all classifications and rates for the plant covered by the contracts, and (g) furnish any additional information gained through negotiations with the respective plant management that may be useful to other local unions in their collective bargaining.

<sup>9</sup> She testified that as recording secretary she prepared blank grievance forms, grievance factsheets, and the steward's call-to-office sheet; typed the contents of statements of exchange for written grievances as directed by members of the shop committee; and checked the seniority dates on layoff lists and other company lists for accuracy. She acknowledged that she was not involved in any actual representation of employees.

<sup>10</sup> Thus, although she had received some instructions for typing the contents of the statements of exchange from shop committeemen at the plant, she also received this information by telephone.

<sup>11</sup> Respondent Union's constitution provides that the duties of the sergeant-at-arms are to introduce all new members and visitors at its meetings, to assist the president in preserving order at such meetings when necessary, and to take care of certain of its property.

Testimony also established that union guide<sup>12</sup> Joseph Duncan had no in-plant duties specific to that office and that trustee<sup>13</sup> Robert Hayes' sole in-plant duty specific to his office was signing vouchers.

With respect to the duties of the members of the executive board, we note that the executive board acts on behalf of the membership and makes recommendations to the membership, but, according to Respondent Union's bylaws, is subject to the final authority of the membership on all matters including grievance processing and collective bargaining.<sup>14</sup> It has delegated, pursuant to Respondent Union's bylaws, the direct handling of grievances and bargaining to the bargaining committee, also known as the shop committee. (None of the four officers at issue here is a member of that committee.) It does, however, in a joint effort with the membership and the shop committee, participate in the formulation of bargaining demands.<sup>15</sup> It also makes recommendations to the membership on strike votes and sets up strike committees when necessary.

Finally, members of the executive board answer employee questions about the Union and relay information to unit employees from Respondent Company. To the extent such occurs at the plant, it appears to be the only in-plant function stemming from membership on the executive board of the four officers here involved.<sup>16</sup>

<sup>12</sup> The guide's duties are essentially to maintain order at Respondent Union's meetings, inspect the membership proceeds, and confirm that all persons attending the meetings are entitled to do so.

<sup>13</sup> The trustee's duties, according to Respondent Union's constitution, are to supervise all the funds and property of the local union and to conduct semiannual audits of the records of the local union financial officers.

<sup>14</sup> According to the chairman of the bargaining committee, Donald Brewer, the executive board acted independently during the summer months when membership meetings were suspended. However, he also testified that the executive board is usually suspended during the same time and has never acted on a grievance without the membership's ratification.

<sup>15</sup> The president of the executive board also meets with the stewards' council. The record substantiates only the instructional activity of these meetings. Executive board members may attend but their attendance is not required, and the four officers at issue here did not attend on a regular basis.

<sup>16</sup> Recording secretary Cherry Germann and sergeant-at-arms Clay Wilson were also, respectively, chairperson of the women's committee and a member of the fair practices committee. These committees monitored, respectively, the parties' treatment of women and other minorities under the collective-bargaining agreement. Although the Union frequently appointed executive board members to standing committees, no evidence demonstrated that participation on the executive board compelled participation on any other committee.

The record fails to show that the extra positions on these committees ever required Germann or Wilson to perform any substantive on-the-job duties. Although Germann filed one grievance related to the women's committee, she filed this grievance with the member of the shop committee who headed the health and welfare committee and she was the actual grievant herself. (Also, since Germann's departure because of disability, no female employees remain in the plant.) Wilson investigated one complaint while on the fair practices committee but did so off the job. Fur-

*Continued*

The Administrative Law Judge found that the contract does not accord superseniority to union officers as such, but only to stewards, bargaining committee members, and five members of the executive board.<sup>17</sup> Then, applying the reasoning of *Limpco, supra*, he found that the executive board members were properly accorded superseniority because their responsibilities were directly related to the effective and efficient representation of union employees, despite the fact that they performed the bulk of their duties outside the plant.

Analyzing the evidence under the Board's new approach set forth in *Gulton Electro-Voice, supra*, we find that none of the duties of any of these employees either attaching to their status as a member of the executive board or specific to their particular union office requires their presence at the plant such as to justify the grant of superseniority. The trustee and recording secretary could attend to their respective ministerial duties of signing vouchers and maintaining the bulletin board with only the minor inconvenience of an occasional trip to the plant<sup>18</sup> (or the trustee could arrange to sign the vouchers at another location). In addition, although Germann received some instructions on statements of exchange at the plant, she also receives them away from the plant by telephone with no detriment to her strictly clerical duty of typing the contents of those statements. Further, the incidental duties of generally answering questions about Respondent Union and relaying information from Respondent Company that all the members of the executive board share, and which are the sole in-plant union functions of the guide and the sergeant-at-arms, do not reach the substantive level of grievance-processing or contract administration that a meaningful reading of *Gulton Electro-Voice*, necessarily contemplates.

Consequently, we find that, by applying the superseniority clause and according superseniority to executive board members union guide Joseph Duncan, recording secretary Cherry Germann, and sergeant-at-arms Clay Wilson, and thereby effectuating the layoffs out of order of seniority of Michael Szczepanowski, Steven Raczka, and David Raczkowski on 13 November 1981, David Raczkowski on 9 April 1982, John Hoefer on 30 April

1982, and Richard Lawicki and Vincent Moncreiffe on 6 August 1982, Respondent Company discriminated against employees in violation of Section 8(a)(1) and (3) of the Act, and Respondent Union violated Section 8(b)(1)(A) and (2).<sup>19</sup> Further, we find that, by threatening employee Kenneth Jusiak that he would be laid off in order to retain executive board member and trustee Robert Hayes, Respondent Company violated Section 8(a)(1) of the Act.

#### THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

We have found that Respondents violated the Act by unlawfully applying the superseniority provision of the collective-bargaining agreement in derogation of the rights of the following senior employees: Michael Szczepanowski, Richard Lawicki, Steven Raczka, David Raczkowski, Vincent Moncreiffe, and John Hoefer. Consequently, we shall order that Respondent Company offer to reinstate these employees who would not have been laid off but for the unlawful application of the superseniority provision and that Respondents jointly and severally make these affected unit employees whole for any loss of earnings they may have sustained as a result of the discrimination against them. We shall also order that Respondent Company expunge from its files any reference to the unlawful layoffs, and shall notify the affected employees that this has been done and that the unlawful layoffs will not be used as a basis for future personnel actions against them. Backpay shall be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962). Also, in order to remedy in full the effects of Respondents' unlawful conduct, Respondent Company's backpay obligation shall run from the effective date of the discrimination against affected unit employees to the time it makes such recall offers, while Respondent Union's obligation shall run from such effective date to 5 days after the date of its notification to Respondent Company that it has no objection to the recall of unit employees affected by the unlawful grant of superseniority to union of-

ther, although Respondent Company's personnel manager, Robert Abwender, testified that he has talked about matters concerning the fair practices committee at the plant, the only specifics he could recall pertained to another participant on that committee, Winston Valentin. Wilson testified that in his sole in-plant contact with Respondent related to this position he merely asked for the address and telephone number of the affected employee in the above complaint.

<sup>17</sup> This conclusion is based on the fact that while Respondent Union's bylaws require all officers to be executive board members, the contract provides superseniority for only five members of the board, although there are nine members in total.

<sup>18</sup> See *Gulton Electro-Voice, supra*.

<sup>19</sup> We find no merit to Respondent Union's contention that *Gulton Electro-Voice*, should not be applied retroactively. We note that the new standard enunciated in *Gulton Electro-Voice*, was applied immediately therein.

ficers.<sup>20</sup> Finally, we shall order that Respondent Company cease and desist from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, and that Respondent Union likewise cease and desist from restraining or coercing employees it represents from exercising those same rights.

#### CONCLUSIONS OF LAW

1. Niagara Machine & Tool Works is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By applying a seniority clause in their collective-bargaining agreement according to superseniority to Respondent Union's executive board members holding the office of union guide, recording secretary, and sergeant-at-arms, Respondent Company and Respondent Union have engaged in, and are engaging in, unfair labor practices within the meaning of Sections 8(a)(1) and (3), and 8(b)(1)(A) and (2) of the Act, respectively, and by discriminating against unit employees Michael Szczepanowski, Richard Lawicki, Steven Raczka, David Raczowski, Vincent Moncreiffe, and John Hoefer, when Respondent Company laid off these employees at dates when they would not have been so affected if the collective-bargaining agreement had not accorded the above-named union officers superseniority, Respondents engaged in further violations of the foregoing sections of the Act.

4. By threatening employee Kenneth Jusiak that he would be laid off in order to retain Respondent Union's executive board member and trustee Robert Hayes, Respondent Company violated Section 8(a)(1) of the Act.

5. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Company, Niagara Machine & Tool Works, Buffalo, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

<sup>20</sup> Member Jenkins would not terminate Respondent Union's backpay liability as of 5 days after it notifies Respondent Company that it has no objection to the recall of those affected by the unlawful seniority provision herein. After such notification, Member Jenkins would continue to hold Respondent Union secondarily liable for any additional backpay amounts. See his dissent in *Claremont Resort Hotel*, 260 NLRB 1088 (1982), and cases cited therein.

(a) Applying collective-bargaining provisions with Respondent Union, Local 508, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, concerning layoff and recall, so as to accord the Union's guide, recording secretary, and sergeant-at-arms superseniority with respect to such matters.

(b) Discriminating against any employees by laying them off instead of the Union's guide, recording secretary, or sergeant-at-arms when such employees have greater seniority in terms of length of employment than has one of the aforementioned union officials.

(c) Threatening to lay off employees with greater seniority in terms of length of employment in order to retain the Union's trustee.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Jointly and severally with Respondent Union make unit employees Michael Szczepanowski, Richard Lawicki, Steven Raczka, David Raczowski, Vincent Moncreiffe, and John Hoefer whole for any loss of earnings they may have suffered as a result of the discrimination against them, such earnings to be determined in the manner set forth in the section of this Decision entitled "The Remedy" and offer to reinstate the above-named employees who would not have been laid off but for the unlawful assignment of superseniority to the union guide, recording secretary, and sergeant-at-arms.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Expunge from its files any reference to the layoffs of the above-named employees affected by the superseniority as applied to the Union's guide, recording secretary, and sergeant-at-arms, and notify them in writing that this has been done and that evidence of the unlawful layoffs will not be used as a basis for future personnel actions against them.

(d) Post at its establishment in Buffalo, New York, copies of the attached notice marked "Ap-

pendix A.”<sup>21</sup> Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent Company’s representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Company to ensure that such notices are not altered, defaced, or covered by any other material.

(e) Post at the same places and under the same conditions as set forth in paragraph A,2,(d), above, as soon as forwarded by said Regional Director, copies of the attached notice marked “Appendix B.”

(f) Mail signed copies of the attached notice marked “Appendix A” to the Regional Director for Region 3 for posting by Respondent Union.

(g) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent Company has taken to comply herewith.

B. Respondent Union, Local 508, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Applying those clauses in its collective-bargaining agreement with Respondent Company, Niagara Machine & Tool Works, concerning layoff and recall so as to accord the Union’s guide, recording secretary, and sergeant-at-arms superseniority with respect to such matters.

(b) Causing or attempting to cause Respondent Company to discriminate against employees in violation of Section 8(a)(3) of the Act.

(c) In any like or related manner restraining or coercing the employees of Respondent Company in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Jointly and severally with Respondent Company make the above-named unit employees whole for any loss of earnings they may have suffered by reason of the discrimination against them, such lost earnings to be determined in the manner set forth in the section of this Decision entitled “The Remedy.”

<sup>21</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant To a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

(b) Notify Respondent Company in writing that it has no objection to reinstating the affected unit employees who but for the unlawful assignment of superseniority would not have been laid off.

(c) Expunge from its files any reference to the layoffs of the above-named employees affected by the superseniority as applied to the Union’s guide, recording secretary, and sergeant-at-arms, and notify them in writing that this has been done and that evidence of the unlawful layoffs shall not be used as a basis for future personnel actions against them.

(d) Post at its office and meeting halls used by or frequented by its members and employees it represents at Respondent Company’s Buffalo, New York, facility copies of the attached notice marked “Appendix B.”<sup>22</sup> Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent Union’s representative, shall be posted by Respondent Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to the above-described members and employees are customarily posted. Reasonable steps shall be taken by Respondent Union to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Post at the same places and under the same conditions as set forth in paragraph B,2,(d), above, as soon as forwarded by said Regional Director, copies of the attached notice marked “Appendix A.”

(f) Mail signed copies of the attached notice marked “Appendix B” to the Regional Director for Region 3 for posting by Respondent Company.

(g) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith.

<sup>22</sup> See fn. 21, *supra*.

## APPENDIX A

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT apply any clause in our collective-bargaining agreement with Local 508, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, so as to accord the Union's guide, recording secretary, and sergeant-at-arms superseniority with respect to layoff or recall.

WE WILL NOT discriminate against any employees by laying them off instead of the Union's guide, recording secretary, or sergeant-at-arms when such employees do not in fact have top seniority in terms of length of employment.

WE WILL NOT threaten to lay off employees with greater seniority in terms of length of employment in order to retain the Union's trustee.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights protected by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to Michael Szczepanowski, Richard Lawicki, Steven Raczka, David Raczkowski, Vincent Moncreiffe, and John Hoefer, who were discriminatorily laid off instead of the Union's guide, recording secretary, or sergeant-at-arms.

WE WILL expunge from our files any reference to the layoffs of the above-named employees affected by the superseniority as applied to the Union's guide, recording secretary, and sergeant-at-arms and WE WILL notify them in writing that this has been done and that evidence of the unlawful layoffs will not be used as a basis for future personnel actions against them.

WE WILL jointly and severally with the Union make the above-named unit employees whole for any loss of earnings they may have suffered as a result of the discrimination against them, with interest.

NIAGARA MACHINE & TOOL WORKS

#### APPENDIX B

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions,

the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT apply any clause in our collective-bargaining agreement with Niagara Machine & Tool Works, so as to accord the union guide, recording secretary, and sergeant-at-arms superseniority with respect to layoff or recall.

WE WILL NOT cause or attempt to cause Niagara Machine & Tool Works to discriminate against any employees by requiring that the collective-bargaining agreement be applied so as to lay them off instead of the union guide, recording secretary, or sergeant-at-arms when such employees do not in fact have top seniority in terms of length of employment.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights protected by Section 7 of the Act.

WE WILL notify Niagara Machine & Tool Works that we have no objection to reinstating the affected unit employees Michael Szczepanowski, Richard Lawicki, Steven Raczka, David Raczkowski, Vincent Moncreiffe, and John Hoefer, who but for the unlawful assignment of superseniority would not have been laid off.

WE WILL jointly and severally with Niagara Machine & Tool Works make the above-named employees whole for any loss of earnings they may have suffered as a result of the discrimination against them, with interest.

WE WILL expunge from our files any reference to the layoffs of the above-named employees affected by the superseniority as applied to the union guide, recording secretary, and sergeant-at-arms and WE WILL notify them in writing that this has been done and that evidence of the unlawful layoffs will not be used as a basis for future personnel actions against them.

LOCAL 508, INTERNATIONAL UNION,  
UNITED AUTOMOBILE, AEROSPACE  
AND AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA

#### DECISION

#### STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge: The consolidated cases were heard in Buffalo, New York, on October 25 and 26, 1982.<sup>1</sup> The charges in Cases 3-CA-

<sup>1</sup> All dates hereinafter refer to 1982, unless otherwise indicated.

10961 and 3-CB-4023 were filed by Steven Raczka, an individual, against Niagara Machine & Tool Works (herein Respondent Company) and Local 508, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (herein Respondent Union) on March 29. A consolidated complaint issued on these charges May 1. The charges in Cases 3-CA-11007 and 3-CB-4041 were filed against Respondent Union and Respondent Company by David Racakowski, an individual, on April 29. The charges in Cases 3-CA-11021 and 3-CB-4045 were filed by John Hoefer against Respondent Union and Respondent Company on May 10. A consolidated complaint on these charges was issued on May 27. The charges in Cases 3-CA-11168 and 3-CB-4095 were filed by Richard Lawicki, an individual, against Respondent Company and Respondent Union on August 10. The charges in Cases 3-CA-11178 and 3-CB-4099 were filed by Vincent Moncreiffe, an individual, against Respondent Company and Respondent Union on August 17. A consolidated complaint incorporating all of the above charges issued on September 17. The issue in this case is whether Respondents unlawfully laid off the above Charging Parties in violation of Sections 8(a)(1) and (3) and 8(b)(1)(A) and (2) of the Act because of the improper application of a preferential seniority clause contained in the collective-bargaining agreement between Respondents. Also at issue is whether Respondent Company threatened to lay off an employee by invoking the same superseniority clause in favor of Robert Hayes in violation of Section 8(a)(1) of the Act.

The parties were afforded an opportunity to be heard, to call, to examine, cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel and from counsel for Respondents.

Upon the entire record and based on my observation of the witnesses, and in consideration of the briefs submitted, I make the following:

## FINDINGS OF FACT

### I. JURISDICTION

The Company, a New York corporation, is engaged in the manufacture of metal forming machine tools and related products at its plant in Buffalo, New York, where it annually purchases and receives at its Buffalo facility goods and materials valued in excess of \$50,000 directly from points located outside the State of New York. The parties admit, and I find, that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties further admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. UNFAIR LABOR PRACTICES

#### A. Background

1. The parties stipulated that Respondents have a collective-bargaining agreement effective from May 1, 1980 to April 30, 1983, and that it contained a superseniority clause which reads:

Notwithstanding his position on the seniority list, each member of the shop committee and not more than five (5) members of the executive board shall, at the point where they would be subject to layoff from the plant, be continued at work as long as there is a job in the plant that they are able to do. Each steward shall, in the event of a layoff, be continued at work as long as there is a job in his respective zone which he is able to do and while any of his respective constituents are still at work and shall be recalled to work after the layoff as soon as there is a job in his respective zone which he is able to do and as soon as any of his respective constituents have been recalled to work.

2. The parties further stipulated that:

(a) On November 13, 1981, and August 6, Respondents invoked the above-superseniority clause to lay off Michael Szczepanowski and Richard Lawicki, respectively, in order to retain Joseph Duncan, the Union's guide and executive board member, who has less seniority than the laid-off employees.

(b) Respondents invoked the above superseniority clause to lay off Steven Raczka and David Raczkowski on November 13, 1981, David Raczkowski on April 9, and Vincent Moncreiffe on August 6 in order to retain Cherry Germann, recording secretary and executive board member, who has less seniority than the laid-off employees.

(c) Respondents invoked the above superseniority clause in order to lay off John Hoefer on April 30, and retain Clay Wilson, the Union's sergeant-at-arms and executive board member who has less seniority than Hoefer.

(d) On April 30, Respondent by its supervisor and agent, Frederick Giese, told Kenneth Jusiak, an employee, that he would be laid off in order to retain Robert Hayes. Robert Hayes was the Union's trustee and executive board member who held the job of Kenneth Jusiak from April 30 to June 11, when Jusiak was unavailable for work due to injury. On June 9, Hayes resigned his office as trustee and was laid off on June 11. Jusiak's job was eliminated and he was laid off on June 14.

3. The Company and the Union have had the same superseniority clause in their contracts since 1947 and had to invoke this clause for the first time in November 1981. From that time to the time of the hearing, the Company's work force was reduced from 430 to 200 employees. In November 1981, when the second shift was eliminated the four shop stewards on that shift were laid off.

4. Under the superseniority clause, the protected employee must be qualified to perform a job in the plant or he will be laid off. Executive board members who are laid off have no priority recall rights. The shop committee and the bargaining committee are one and the same.

5. There are 13 members of the executive board: president, vice-president, financial secretary, recording secretary, 3 trustees, sergeant-at-arms, guide, and 4 committeemen.

*B. The General Counsel's Position and Supportive Evidence*

The General Counsel called witness Robert Abwender, Respondent Company's industrial relations manager, who testified that the four individuals, Germann, Hayes, Duncan, and Wilson were not members of the bargaining committee on November 13, 1981, but were members of the executive board. He further testified that no one else except the local union president and the bargaining committee participates in the actual contract negotiations and that he never met with the four individuals in question to negotiate a contract. Since he only becomes involved in grievances at the third step he did not know whether the four individuals in question ever handled any grievances. Abwender further stated that the four individuals in question would not be considered representatives (shop stewards) of the employees in accordance with the collective-bargaining agreement, and that only stewards and shop committee members are entitled to paid time off to handle union business under the contract. He stated that the recording secretary is paid for certain union business, i.e., administering to the union bulletin board and certain union correspondence, and that arbitration hearings are held on companytime. According to Abwender, the president of the Company holds state of the company meetings periodically to inform the executive board about the current status of the Company with respect to future business, current business, and other financial matters affecting the employees. He testified that the fair practices committee was established by the Union to enforce certain contract provisions relating to discrimination because of race, creed, color, sex, and national origin, and that Clay Wilson has been a member of this committee at all times material herein. Abwender also testified that the Company follows seniority by job classification with bumping rights.

The General Counsel argues in brief that the recording secretary, sergeant-at-arms, trustee, and guide are not entitled to the benefits of superseniority because they do not perform any functions which involve them in the administration of the contract at the plant during working hours nor do their functions relate in general to the furthering of the collective-bargaining relationship between Respondent Union and Respondent Company. *McQuay-Norris*, 258 NLRB 1397 (1981). According to the General Counsel, the functions of these individuals relate to the internal workings of Respondent-Union rather than those areas which the Board recognizes as justifying the application of superseniority. The General Counsel further asserts that the fact that these officers are also executive board members is not significant because their activities in that capacity fail to meet the test applied in *McQuay-Norris*. He states that from the record evidence, the executive board functions almost exclusively outside the plant and relies on reports from the bargaining committees regarding any in-plant grievances or contract negotiations. He further states that unlike the stewards, who are paid by the employer when conducting union business, the executive committee members are compensated by Respondent Union when they leave the plant to attend meetings. The General Counsel finally argues that since

the recording secretary was performing her duties while not working at the plant, this is further evidence that her representative functions do not relate to her presence on the job.

*C. Respondent's Position and Supportive Evidence*

Robert Hayes was a trustee of Local 508 prior to his resignation in June. In addition to his responsibility as an executive board member, he also had the powers and duties of a trustee. The Union's constitution provides that a trustee shall have general supervision over all funds and property of the local union and shall cause the records of the financial officers of the local union to be audited semiannually. The trustee also handles some internal administrative union details such as signing vouchers for union expenditures.

Clay Wilson was elected by the local union to be sergeant-at-arms and executive board member in May 1981. Under the International Union's constitution the duties of the sergeant-at-arms are to introduce all new members and visitors (at union meetings) and assist the president in preserving order when called upon to do so. He also shall take charge of all property of the local union not otherwise provided for. Wilson testified that he had no in-plant responsibilities as sergeant-at-arms. He further conceded that he never handled or processed grievances in his capacity as sergeant-at-arms or executive board member. As a member of the executive board, Wilson was appointed to the Union's fair practices Committee in May 1981. The Union's fair practices committee monitors company and union activities under the contract to make sure that equal opportunities are afforded to all employees in accord with the nondiscrimination provisions of the contract. On several occasions, fair practices committee members have met with company representatives on companytime and in the plant to present claims of discrimination against employees of the work force and to resolve those claims.

Joseph Duncan is the Union's guide and a member of the executive board. Duncan's duties as guide require him to maintain order, inspect the membership proceeds, satisfy himself that all present are entitled to remain in the meeting of the local union and to perform such other duties as are usual of the office.

Cherry Germann was elected to the recording secretary position in May 1981. She is also a member of the executive board and the women's committee. The duties of the recording secretary as set forth in the local union bylaws and the International constitution are as follows: (a) Keep records of proceedings of the local union, (b) sign all orders on the treasury authorized by the local union, (c) read all documents and conduct the general correspondence, (d) bring to the attention of membership all correspondence which needs action by the membership, (e) furnish to the research department of UAW and to the Regional Director every 6 months, three copies of the existing contracts, (f) complete revised lists of all classifications and rates for the plant covered by the contracts, and (g) furnish any additional information gained through negotiations with the respective plant management that may be useful to other local unions in their



collective bargaining. Germann also had certain duties under the collective-bargaining agreement. She was responsible for maintaining the Union's bulletin boards as provided for in the contract and for which the company paid her because she performed these duties during her regular working hours. Under the contract grievance procedure, the Union is required to present the Company with written statements on grievances. These are called statements of exchange. During the past year approximately 40 written statements of exchange were prepared by the recording secretary and submitted to the Company. In addition, the recording secretary prepares employee grievance forms, grievance fact sheets, and the steward's call to office sheet and makes sure that there are sufficient copies of those forms available for stewards and committeemen. Germann frequently consulted with committeemen and stewards on companytime regarding the form or content of these documents. The recording secretary also reviews the notices provided by the Company pursuant to the contract, regarding persons on layoff or sick leave. She checks seniority dates and, if not correct, advises a committeeman or the employer to correct any inaccuracies so as to eliminate seniority disputes. Germann is also a member of the women's committee of the local union and in that capacity monitors the equal employment provisions of the contract to see that they are adhered to with respect to the rights of women.

In accordance with the International constitution and the bylaws of the local union, the executive board is empowered to represent the local union between meetings of the local union when urgent business requires prompt and decisive action. However, the executive board's action is subject to approval of the membership. Between general membership meetings, the highest authority of the local union is the executive board which shall meet at least once a month. Procedurally, the executive board recommends to the membership the decisions it should make. The membership generally adopts those recommendations. In certain situations (during the summer months when the membership does not meet) they may act without membership approval.

The bylaws provide that the executive board be composed of the officers of the local union and the bargaining committee members. Under the bylaws, it is the duty of the executive board to run the local union and direct payment of all ordinary bills and expenses of the local union.

The executive board meets once a month outside the plant, and members of the board who are working are excused to attend these meetings by the Employer. At these meetings the board acts to discuss, review, authorize, and recommend or not recommend the reports of various committees, including the bargaining committee, the standing committees and the stewards council. A number of these standing committees (fair practices, pension, insurance, and health and safety) along with the shop committee and stewards council have contract administration duties. During the board meetings each committee makes a report and the board votes on whether to recommend or not recommend these reports to the membership. The executive board also receives the report of

the bargaining committee and frequently makes determinations regarding grievances and how they should be handled, particularly with respect to whether they should be taken to arbitration.

Prior to contract negotiations the executive board and the bargaining committee, based on questionnaires sent to the membership, formulate and/or determine the Union's bargaining position on issues and the priorities given to each issue. During contract negotiations, the bargaining committee reports on the progress of negotiations to the executive board who decides, based on these reports, whether to call a strike or not. The executive board's recommendation is made to the membership who votes on whether to institute a strike action. If a strike is called, the executive board is responsible for administering it by appointing strike committees and captains and handling strike benefits. Generally, the membership accepts the executive board's recommendations.

Executive board members are frequently appointed to standing committees so that the board will have a member on each standing committee who can bring information and complaints back to the executive board meetings which, in turn, may help them in grievance and contract enforcement matters.

The executive board engaged in midterm negotiations with the Company over the vision eye care program by recommending option 2 of the program to the membership, which was accepted. This option is now contained in the collective-bargaining agreement.

Executive board members attend steward's council meetings for the purpose of solving specific grievance related problems that are raised by the stewards. Executive board members also instruct new stewards on the grievance procedure as it relates to the contract, the contract terms, and the many negotiated letters of agreement between the Company and the Union. This is necessary because of the constant turnover in union stewards.

Respondents' counsel argues, citing *Machine Workers Local 623 (Limco Mfg.)*, 230 NLRB 406 (1977), *enfd. sub nom. D'Amico v. NLRB*, 582 F.2d 820 (3d Cir. 1978), that there is sufficient evidence in the record to support the use of superseniority for the recording secretary as an executive officer. They further argue, citing *Otis Elevator Co.*, 231 NLRB 1128 (1977), that the Board approved the application of superseniority to the local president and sergeant-at-arms who were also members of the executive committee, "because in their capacity they contributed to the ability of the Union to represent the Union efficiently and effectively."

With respect to the other officers, Respondents' counsel argues that they are also executive board members, and in both capacities their duties involve significant activities which help implement the collective-bargaining agreement in a meaningful way and generally further the bargaining relationship, citing *American Can Co.*, 244 NLRB 78 (1979), *enfd.* 658 F.2d 746 (10th Cir. 1981), *Machine Workers Local 623 (Limco Mfg.)*, 230 NLRB 406 (1977), *D'Amico v. NLRB*, 582 F.2d 820 *Expedient Services*, 231 NLRB 938 (1977). They further argue that the *American Can* decisions differ from the present case in that those cases lacked evidence other than official de-

scription of duties found in the Union's constitution that the employees receiving superseniority were engaged in activities vital to the collective-bargaining relationship.

#### Analysis and Conclusions

A review of the various cases dealing with the application of superseniority leads me to conclude that certain principles have evolved. It appears clear at the present time that superseniority may be accorded to union officials other than stewards. The Board has also held that once it has been initially demonstrated that the official responsibilities of the union officer in question bear a direct relationship to the effective and efficient representation of union employees, then the officer is entitled to the benefit of the same protection afforded to union stewards. *Machine Workers Local 623 (Limpco Mfg.)*, *supra*. It was further stated in that decision that union officials can be covered by superseniority if they facilitate the effective administration of the collective-bargaining agreement on the plant level and that the General Counsel continues to have the burden of proving affirmatively that the application of a superseniority provision to a functional union officer is invalid.

With these principles in mind, I find that the contract does not accord superseniority to any union officers but, instead, speaks only to stewards, bargaining committee members, and five executive board members. While it may be argued that the local union's bylaws require all officers to be members of the executive board, and that this requirement indirectly protects all officers, it is important to note that the Union had nine officers while the contract only protects five executive board members. Therefore, any union officer, at the discretion of the Union, could be denied protection under the contract. In fact, the Union only protected three of its officers under this clause. Therefore, it appears to me that the duties of the officers are not as relevant to this case as the duties of the executive board members. With respect to this issue the General Counsel failed to carry his burden of proving that executive board members do not contribute to the efficient and effective administration of the collective-bargaining agreement at the plant level. He only called one witness who was the Company's industrial relations manager and elicited virtually no evidence in support of his contention with respect to executive board

members. On the other hand, Respondents went forward and proved that executive board members are involved in nearly every facet of contract administration at the plant level. The evidence indicates that executive board members are really the backbone of the local union who are involved either directly or indirectly in every decision made at the local level on such important matters as collective-bargaining, substantive grievance matters, grievance procedures, arbitration, and strikes. In this capacity, they also counsel and advise the membership as a body as well as individual employees. I can find no basis for denying executive board members superseniority merely because they perform the bulk of their duties outside the plant gate. I find this argument to be irrelevant simply because it ignores the realities of collective-bargaining and contract administration.

After reviewing all the evidence presented, I find that the General Counsel has not sustained his burden of proof. I also find that Respondents have not violated the Act by maintaining a superseniority provision in their contract or by applying it under the circumstances of this case.

Based on the above findings, I further find no violation with respect to Frederick Giese as alleged in paragraph VII of the complaint.

Although this did not enter to my decision, it cannot be overlooked that, for the past 35 years, the employees at Niagara Machine ratified contracts containing a presumptively valid superseniority clause. It seems incongruous that now the Company and Union are being charged with a violation of the Act for merely carrying out the mandate of the employees including the charging parties.

#### CONCLUSIONS OF LAW

1. Respondent Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondents have not engaged in any violation of the Act.

[Recommended Order for dismissal omitted from publication.]